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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Phyllis Wehlage, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Evergreen at Arvin LLC; Evergreen at Bakersfield LLC; Evergreen at Lakeport LLC; Evergreen at Heartwood LLC; Evergreen at Springs Road LLC; Evergreen at Tracy LLC; Evergreen at Oroville LLC; Evergreen at Petaluma LLC; Evergreen at Gridley (SNF) LLC; Evergreen at Chico LLC; Evergreen at Salinas LLC; Evergreen at Fullerton LLC,

Defendants.

Case No. 4:10-cv-05839-CW

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: June 21, 2012
Time: 2 p.m.
Judge: The Honorable Claudia Wilken
Courtroom: 2, 4th Floor

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 21, 2012, at 2 p.m., in the Courtroom of the Honorable Claudia Wilken, United States District Judge for the Northern District of California, located at 1301 Clay Street, Oakland, CA 94612, Plaintiffs, on behalf of themselves and all others similarly situated, will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for entry of an Order preliminarily approving a proposed Settlement Agreement ("Settlement") entered into between the parties, and for other related relief.

By this unopposed motion, Plaintiffs respectfully move the Court for an Order:

1. Preliminarily approving the Settlement in this action pursuant to Federal Rule of Civil Procedure 23(e);[1]

2. Preliminarily certifying a Settlement Class pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2);

3. Appointing the attorneys listed in the signature block as Class Counsel;

4. Appointing Plaintiffs as Settlement Class Representatives;

5. Approving the parties' proposed forms of notice and notice program, and directing that notice be disseminated pursuant to this program; and

6. Setting a Fairness Hearing and certain other dates in connection with the final approval of the Settlement.

This Motion is based on the accompanying Memorandum of Points and Authorities, the Settlement Agreement, the Stipulated Order for Injunction, the Stipulated Judgment, the Confession of Judgment, the Guaranty, the accompanying Declarations of Catherine A. Yanni, Michael J. Eggers, Dennis C. Reinholtsen, Robert J. Nelson, Christopher J. Healey, Michael D. Thamer, Kathryn A. Stebner, W. Timothy Needham, Robert S. Arns, C. Brooks Cutter, and Edward P. Dudensing, documents attached to those Declarations, any papers filed in reply, the argument of counsel, and all papers and records on file in this matter.

[1] A copy of the executed Settlement Agreement is attached as Exhibit A to this Motion. A copy of the Stipulated Injunction is attached as Exhibit 1 to the Settlement Agreement.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs respectfully request that the Court enter an Order preliminarily approving the proposed Settlement Agreement that would resolve this case. This Settlement Agreement, attached hereto as Exhibit A, follows several arms-length settlement negotiations facilitated by a neutral mediator. The proposed Agreement is the result of considerable efforts by both sides, represents a significant achievement for the Class of skilled nursing home patients at issue, and is well within the range of reasonableness. Accordingly, preliminary approval is appropriate and should be granted.

This case involves allegations of Defendants' pervasive and intentional failure to provide legally sufficient qualified nurse staffing. All skilled nursing facilities in California are required to provide at least 3.2 hours of direct nursing hours per patient day in accordance with California Health and Safety Code section 1276.5. This statutory 3.2 hour requirement represents the minimum aggregate staffing that all patients at skilled nursing facilities must receive. Plaintiffs allege that Defendants' facilities, in violation of law, failed to meet this requirement.

Plaintiffs brought suit primarily to force Defendants to comply with this California statute. The stipulated Injunction incorporated into the Settlement achieves this goal, requiring Defendants to ensure proper staffing in their skilled nursing facilities. Defendants agree to employ an adequate number of qualified nursing personnel to provide skilled nursing services at their facilities. This injunction has bite: a third party monitor will oversee Defendants' compliance, and the Court retains jurisdiction to order appropriate remedies in the event of non-compliance.

Defendants' financial condition precludes them from making cash payments to the Class. The agreed-upon cash payment of less than $2 million—to administer this Settlement, cover litigation expenses, and compensate Class Counsel for a portion of its lodestar (subject to Court approval)—constitutes the upper limit on what Defendants can realistically afford. A greater payment would, in all likelihood, lead them into bankruptcy. Class Counsel thoroughly investigated and confirmed Defendants' represented financial condition before agreeing to this

Settlement. Class Counsel retained a forensic accounting expert to review Defendants' financial documents, and conducted a lengthy deposition of the Chief Financial Officer of EmpRes Healthcare Management. Importantly, the Class members' claims are *not* being released, so the absence of cash compensation causes them no prejudice. Rather, the Settlement expressly preserves the ability of every Class member to pursue individual claims for damages.

For the reasons set forth below, the Settlement is within the range of reasonableness and should be preliminarily approved.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, current and former residents of Defendants' skilled nursing facilities (the "Facilities"), brought this action for injunctive relief and damages based on injuries from Defendants' chronic understaffing of the Facilities, and their failure to disclose those conditions.[2] The understaffing claims arise under California's Health and Safety Code section 1430(b), which provides a cause of action for violations of the right to adequate nurse staffing under Health and Safety Code section 1599.1(a), and the right to reside in a facility that provides at least 3.2 nursing hours per patient day ("NHPPD"), as mandated by Health and Safety Code section 1276.5. Plaintiffs also asserted failure-to-disclose claims under the Consumers Legal Remedies Act, Civil Code section 1750, *et seq.* ("CLRA"), and Business and Professions Code section 17200, *et seq.* ("UCL").

A. Plaintiffs Allege Defendants Violated California Statutes by Understaffing Their Skilled Nursing Facilities.

As Plaintiffs allege, the 3.2 hour NHPPD requirement under section 1276.5 represents the minimum staffing required for patients at skilled nursing facilities. Third Amended Complaint, ¶ 3. Understaffing is uniformly viewed as one of the primary causes of the inadequate care and often unsafe conditions in skilled nursing facilities. Scientific studies have repeatedly shown a

[2] The "Evergreen Defendants" are: Evergreen at Arvin, L.L.C.; Evergreen at Bakersfield, L.L.C.; Evergreen at Chico, L.L.C.; Evergreen at Gridley (SNF), L.L.C.; Evergreen at Fullerton, L.L.C.; Evergreen at Heartwood Avenue, L.L.C.; Evergreen at Lakeport, L.L.C.; Evergreen at Oroville, L.L.C.; Evergreen at Petaluma, L.L.C.; Evergreen at Springs Road, L.L.C.; and Evergreen at Tracy, L.L.C. Plaintiffs also originally sued the "Parent Entities": EmpRes Healthcare, Inc.; EHC Management, L.L.C.; EHC Financial Services, L.L.C.; and Evergreen California Healthcare, L.L.C. As explained below, the Court granted Defendants' Motion to Dismiss the Parent Entities under Washington law. Order of October 13, 2011 (Dkt. No. 79).

direct correlation between inadequate skilled nursing care and serious health problems—including, but not limited to, a greater likelihood of falls, pressure sores, significant weight loss, incontinence, and premature death. Third Amended Complaint, ¶ 2.

Plaintiffs allege that Defendants failed to satisfy the 3.2 hour NHPPD minimum requirements, failed to provide adequate numbers of qualified nursing staff given aggregate patient acuity levels at the Facilities, and failed to employ sufficient numbers of registered nurses on numerous days during the Class Period. Many of Defendants' Facilities have an inordinately high number of reported complaints, deficiencies, and citations resulting from inadequate care of their elderly and dependent adult residents, as reflected in records maintained by the California Department of Health Services. Third Amended Complaint, ¶ 4. These and other facts support liability under Health and Safety Code section 1430(b) for predicate violations of Health and Safety Code sections 1276.5 and 1599.1.

B. The Parties Litigated a Series of Motions to Dismiss.

Plaintiffs originally filed this class action in California state court on November 15, 2010, seeking injunctive relief and damages. On December 22, 2010, then-defendant EmpRes Healthcare, Inc. (since dismissed by Court order) noticed removal to this Court under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), and 28 U.S.C. § 1453 ("CAFA").[3] (Dkt. No. 1). Plaintiffs did not and do not contest the removal. This Court has subject-matter jurisdiction under CAFA, because: (a) this is a putative class action within the meaning of 28 U.S.C. § 1332(d)(1)(B); (b) all members of the proposed Class are citizens of a State (California) different from all Defendants (Washington); and (c) the alleged amount in controversy exceeds $5,000,000.

Defendants filed several motions to dismiss the First Amended Complaint on February 18, 2011, contending: (1) the Court should abstain from hearing the matter on the basis of equitable abstention; (2) Plaintiff Wehlage did not have standing as to the Facilities where she did not

[3] A virtually identical class action is pending against these same Defendants in the Eastern District of California, *Grenzebach v. EHC Management LLC*, No. 11-cv-00197-MCE-DAD (E.D. Cal.). The *Grenzebach* action has been stayed pending this Court's rulings in the present action, and will also be resolved by the proposed Settlement Agreement. Agreement, at 1, 10.

reside; (3) Plaintiffs had not adequately alleged that the Parent Entities were the alter egos of the Facilities under Washington law; (4) Plaintiffs had not alleged their CLRA claims with requisite specificity; and (5) personal jurisdiction over the Parent Entities was lacking.[4] (Dkt. Nos. 22-26.)

On May 25, 2011, the Court granted Defendants' motions on grounds two through four above, dismissing all Defendants except the Lakeport Facility and granting leave to amend the alter ego and CLRA allegations. Order of May 25, 2011 (Dkt. No. 46). In the Second Amended Complaint, filed on June 8, 2011, Plaintiffs added class representatives for each of the previously-named Facilities, and also added two additional Facility Defendants and representatives for each of the latter, for a total of eleven Facilities and thirteen class representatives. Plaintiffs included additional alter ego and CLRA allegations as well. (Dkt. No. 50.)

On June 22, 2011, the Parent Entities again moved to dismiss the claims against them on alter ego grounds, and all Defendants again moved to dismiss on grounds of abstention and failure to sufficiently allege a CLRA claim. In addition, Defendants moved to dismiss the newly-added class representatives on the grounds that Plaintiffs had not sought leave to amend. (Dkt. Nos. 54-58.)

On October 31, 2011, the Court denied Defendants' Motions to Dismiss on abstention grounds, granted Defendants' Motion to Dismiss on alter ego grounds, and granted Defendants' Motions to Dismiss on all other grounds with leave to amend. Order of October 13, 2011 (Dkt. No. 79). On November 7, 2011, Plaintiffs filed a Motion for Leave to Amend their Complaint to include the additional representatives, which Defendants opposed. (Dkt. Nos. 82, 85.) Defendants once again moved to dismiss the CLRA claim, this time on the grounds that Plaintiffs had not provided sufficient notice. (Dkt. No. 85.) On February 6, 2012, the Court granted Plaintiffs' Motion for Leave to Amend and granted the Defendants' Motion to Dismiss the CLRA claim for lack of sufficient notice, with leave to amend once notice was provided. Order of February 7, 2012 (Dkt. No. 90).

Plaintiffs filed their operative Complaint, the Third Amended Complaint, on February 9,

[4] The Facilities did not join in the Parent Defendants' Motion to Dismiss on jurisdictional grounds, and the Lakeport Facility did not join in the other Defendants' Motion to Dismiss on standing grounds.

2012. (Dkt. No. 91.) Defendants again moved to dismiss on abstention grounds, for the third time. (Dkt. No. 95.) Defendants withdrew their Motion in light of the pending Settlement Agreement. (Dkt. No. 99.)

C. The Parties Entered Into Settlement Negotiations and Reached an Agreement.

The parties engaged in three mediation sessions before Catherine A. Yanni at JAMS, on October 24, 2011; December 15, 2011; and March 14, 2012. The negotiations were hard-fought and at arms' length. Declaration of Catherine A. Yanni in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement ("Yanni Decl."), ¶ 5. The parties' early positions at the mediation reflected highly divergent views about the claims and damages asserted against the Defendants, and their defenses thereto. *Id.*, ¶ 6.

Defendants asserted in mediation that their financial resources were extremely limited and that ongoing litigation or meaningful monetary compensation to Class members may push them into bankruptcy. Yanni Decl., ¶ 7. At the second mediation, Defendants shared with Plaintiffs and their expert accountant internal financial documents supporting Defendants' claims regarding their financial condition. *Id.* The mediator stressed that absent a settlement, both sides would incur substantial expenses from continued litigation, and Defendants could face bankruptcy, resulting in no relief at all for the Class. *Id.*, ¶ 8. The parties ultimately reached an agreement in principle at the third mediation.

III. THE PROPOSED SETTLEMENT WILL BENEFIT THE CLASS BY REQUIRING DEFENDANTS TO PROVIDE ADEQUATE STAFFING

The parties executed the Settlement Agreement between April 30 and May 16, 2012. A summary of its material terms is provided below.

A. The Settlement Includes an Injunction Under Which Defendants Agree to Provide Legally Sufficient Skilled Nursing Services.

The centerpiece of the proposed Settlement is a stipulated Injunction that substantially resolves the core issue in this lawsuit: Defendants' systematic violation of the California law requiring them to provide 3.2 hours of skilled nursing services per patient day in their skilled nursing Facilities. Agreement § 6. The stipulated Injunction is attached as Exhibit 1 to the

Settlement Agreement (Exhibit A hereto). The Injunction provides that "[a]t all times, Defendants shall comply with Health and Safety Code section 1276.5 by providing a minimum of 3.2 actual nursing hours per patient day ('NHPPD') at any skilled nursing home owned or operated by the Defendants, or any of them, in California." Stipulated Injunction, ¶ 1. Further, "[a]t all times, Defendants shall comply with Health and Safety Code section 1599.1 by employing an adequate number of qualified personnel to carry out all of the functions of the facility at any skilled nursing home owned or operated by Defendants, or any of them, in California." Stipulated Injunction, ¶ 2.

Defendants agree to track their compliance and submit regular reports to a Court-appointed monitor empowered to "undertake all . . . necessary actions to monitor Defendants' compliance with the terms of this Injunction. All fees and costs of the Monitor shall be paid by the Defendants." Stipulated Injunction, ¶ 4; *see also Id.*, ¶¶ 5-7. "Monitoring Costs shall not be paid from the Settlement Fund, but are instead Settling Defendants' separate financial obligation (which shall also be secured by the Guaranty . . . ." Agreement, § 6.3.

This consent decree will remain in effect for two-and-one-half years after entry of an Order finally approving the Settlement. Stipulated Injunction, ¶ 9; Agreement, § 6.2. The consent decree makes clear that if the Defendants violate its terms, "Plaintiffs may seek a Court order extending the Injunction duration, in addition to any other available remedy." Stipulated Injunction, ¶ 9.

B. Defendants' Financial Condition Precludes Payment of Any Amount Greater Than the Limited Settlement Fund.

Under the Settlement, Defendants will pay $1,999,950 to administer the Settlement, to fund the $2,500 service awards for the named Plaintiffs that Class Counsel will ask the Court to approve, to cover the costs of the Court-approved Notice to the Class, and to compensate Class Counsel (subject to Court approval) for the litigation expenses they advanced and their time spent litigating this action.[5] Agreement, § 5. Defendants have agreed to pay this Settlement

[5] Class Counsel is entitled to attorneys' fees, in part, because of California's mandatory fee-shifting statute for private attorney general actions, including actions under Health and Safety Code § 1430(b) and the Consumer Legal Remedies Act. *See* Cal. Code. Civ. P. § 1021.5; Cal. Health & Safety Code § 1430(b); Cal. Civ. Code § 1780(e). Consistent with *In re Mercury*

Footnote continued on next page

consideration in phases, as they cannot afford to pay the full amount up front. Only $1 million will be paid initially, with the remainder to be paid in 12 monthly installments. Agreement, § 5.1. The total payment under the proposed Settlement that is reserved for attorneys' fees and costs is *less* than Class Counsel's current documented lodestar. Nelson Decl., ¶ 5.

The Settlement does not provide monetary consideration to the Class for a simple reason: the Parent Entities' financial condition prevents them from paying anything more than this limited sum. The Settlement Agreement sets forth Defendants' representation "that a judgment in excess of the Settlement Payment . . . would likely result in bankruptcy or financial impairment at such a level that the company would be in the imminent threat of bankruptcy." Agreement, at 1.

Class Counsel independently verified the Parent Entities' financial condition. As the Agreement states, Plaintiffs hired a forensic accounting expert, Michael J. Eggers, who "was permitted limited review of Settling Defendants' financial information . . . ." Agreement, at 1. In his expert declaration filed under seal, Mr. Eggers describes the documents he reviewed and his conclusion that the Parent Entities lack the financial capability to pay more than the amount they have agreed to pay under the Settlement. Eggers Decl., ¶¶ 5-10. Plaintiffs also deposed the Chief Financial Officer of EmpRes Healthcare Management, Michael J. Miller, who testified that the Parent Entities subsist on a line of credit and the lender would likely discontinue lending, resulting in bankruptcy, if Defendants were to pay in excess of $2 million to settle this litigation. The transcript of this deposition is submitted under seal for the Court's review, as Exhibit A to the Reinholtsen Declaration. Defendants showed Plaintiffs' counsel financial documents at the deposition, and subsequently allowed Mr. Eggers to review these and other financial documents. Eggers Decl., ¶ 5. The documents confirm the precarious state of the Parent Entities' financial affairs. Eggers Decl., ¶¶ 7-9.

Footnote continued from previous page
Interactive Corporation Securities Litigation, 618 F.3d 988 (9th Cir. 2010), Class Counsel will submit lodestar reports in support of their fee application, which will be filed prior to the final fairness hearing. Class Counsel obtained a Guaranty from EmpRes Healthcare Group, to ensure that the payments agreed to under the Settlement will be made. A copy of this Guaranty is attached as Exhibit 3 to the Settlement Agreement (Exhibit A to this Motion).

C. Because Defendants Are Incapable of Providing Monetary Consideration to the Class, the Claims Are Not Being Released.

The Settlement Agreement makes clear that Class member damages claims are not precluded in the future. Agreement, § 9 ("No Releases"). The language in the Settlement Agreement is categorical; it expressly provides that the Settlement does not and will not extinguish *any* future claims against these Defendants:

> Named Plaintiffs and Settlement Class Members are not releasing and do not release any claim(s) whatsoever that they have or may have against Settling Defendants or their Related Persons and Entities. Plaintiffs' sole obligation to Settling Defendants is to dismiss the Actions, without prejudice . . . .

Agreement, § 9.

D. The Settlement Provides for Notice to Class Members of the Terms of the Settlement and Their Ability to Object.

The Settlement provides for dissemination of Notice to every Class member by U.S. mail within 30 days after entry of an Order preliminarily approving the Settlement. Agreement, § 2. The Notice summarizing the Settlement terms, and informing Class members of their right to object, is attached as Exhibit B to this Motion. Notice costs will be paid out of the Settlement fund. Agreement, § 2.5.

IV. THE SETTLEMENT SATISFIES THE LEGAL STANDARDS FOR OBTAINING PRELIMINARY APPROVAL

Judicial proceedings under Federal Rule of Civil Procedure 23 have led to a defined three-step procedure for approval of class action settlements:

> (1) Certification of a settlement class and preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval.
>
> (2) Dissemination of notice of the proposed settlement to the affected class members.
>
> (3) A formal fairness hearing, or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement are presented.

Federal Judicial Center, *Manual for Complex Litigation* (4th ed. 2004), §§ 21.63, *et seq*. ("*Manual 4th*"). This procedure safeguards class members' procedural due process rights and

enables the Court to fulfill its role as the guardian of class interests. *See* 4 *Newberg on Class Actions*, § 11.22, *et seq.* (4th ed. 2002) ("*Newberg*").

With this motion, Plaintiffs respectfully request that the Court take the first step in the settlement approval process by granting preliminary approval to the proposed Settlement.

A. Preliminary Approval Is Appropriate.

The law favors the compromise and settlement of class-action suits. *See, e.g., Byrd v. Civil Serv. Comm'n*, 459 U.S. 1217 (1983); *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). The Ninth Circuit recognizes the "overriding public interest in settling and quieting litigation . . . particularly . . . in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

"[T]he decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof." *Hanlon*, 150 F.3d at 1026. In exercising such discretion, the Court should give "proper deference to the private consensual decision of the parties . . . . [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon*, 150 F.3d at 1027; *see also* Fed. R. Civ. P. 23(e).

At the preliminary approval stage, the Court need only find that the proposed settlement is within the "range of reasonableness" such that dissemination of notice to the class, and the scheduling of a fairness hearing, are worthwhile and appropriate. 4 *Newberg* § 11.25; *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal. 2007); *Young v. Polo Retail, LLC*, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006).

While consideration of the requirements for *final* approval is unnecessary at this stage, all

of the relevant factors weigh in favor of the Settlement proposed here.[6] The Settlement readily satisfies the standard for preliminary approval because: (a) it is the product of serious, arms-length negotiations between the parties, reached after substantial and hard-fought litigation and thorough investigation by Plaintiffs; (b) it provides substantial relief to the Settlement Class in the form of a stipulated injunction, and is fair, reasonable, and adequate given the alleged harm, the value of the injunction, Defendants' tenuous financial condition, and the parties' respective litigation risks; (c) it was negotiated by, and is recommended by, experienced Class Counsel, and was reached with the help of a well-respected mediator, who also supports approval of the Settlement.

1. The Settlement Is the Product of Arms-Length Negotiations and Follows Substantial Litigation and Investigation.

Where, as here, a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the court begins its analysis with a presumption that the settlement is fair and reasonable. *See* 4 *Newberg* § 11.41; *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980). The parties here engaged in three full days of mediation before an experienced mediator, Catherine A. Yanni. Those negotiations, while at times contentious, ultimately resulted in an agreement in principle on the key terms of the proposed Settlement. Yanni Decl., ¶¶ 6-9; Nelson Decl., ¶ 4. For the past two months, the parties have been working to negotiate and finalize the Settlement terms. *Id.* The parties were represented throughout these negotiations by counsel experienced in the prosecution, defense, and settlement of complex class actions, and were guided by the Court's prior rulings in this case.

Moreover, the Settlement is informed by Plaintiffs' thorough investigation and comes after hard-fought litigation. Prior to filing their initial complaint, and continuing throughout the litigation, Plaintiffs closely investigated the staffing practices at issue, by obtaining and analyzing Defendants' reports to the California Office of Statewide Health Planning and Development; obtaining, reviewing and summarizing all of the California Department of Public Health licensing

[6] Plaintiffs will address in detail each of the factors required for final settlement approval in their Motion for Final Approval of the Settlement, to be submitted following issuance of notice to the Class.

and certification files for each named facility; obtaining the workers' compensation files of Defendants' former employees; and tracking down and interviewing such former employees and other potential witnesses. Needham Decl., ¶ 9. Further, as the Court is aware, the pleadings were heavily contested though four rounds of motions to dismiss, and those motions raised complex issues of law and fact.

Class Counsel—who include the same attorneys who won a landmark jury verdict against another skilled nursing home company—were well-equipped to evaluate the Settlement and conclude that it is in the best interests of the Class. Nelson Decl., ¶¶ 3, 9; Thamer Decl., ¶¶ 2-6; Healey Decl., ¶¶ 6-10, 18; Stebner Decl., ¶¶ 3-7; Needham Decl., ¶¶ 4-5, 9-10; Cutter Decl., ¶ 4; *see also* Yanni Decl., ¶ 13 ("[I]n my judgment, Class Counsel's experience in nurse understaffing litigation generally and in class action litigation, and their persistent efforts throughout the course of this hard-fought litigation, played an invaluable role in achieving this settlement on behalf of the Class Members and also benefiting future patients of the facilities.").

2. The Settlement Is Fair Given the Nature of the Claims, the Value of the Injunction, Defendants' Financial Condition, and the Litigation Risks.

a. The Injunction Is an Outstanding Result for the Class.

The proposed Settlement provides important injunctive relief that will benefit Class members and other patients in the future. As the Ninth Circuit has held, the value of a class settlement may include the non-monetary benefits it secures. For example, in affirming approval of a class settlement in *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234 (9th Cir. 1998), the court stressed that "the value of the injunctive relief ($20.9 million to $34.2 million) far outweighs the value of the settlement fund." *Id*. at 1240; *see also Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 147 (E.D. Pa. 2000) (the value of the class settlement approved included the full amount of debt forgiveness provided to the class); *Continental Assur. Co. v. Macleod-Stedman, Inc.*, 694 F. Supp. 449, 468 (N.D. Ill. 1988) (finding a settlement provided fair value based in part on the corporate restructuring it secured).

In *In re HP Laser Printer Litigation*, 2011 U.S. Dist. LEXIS 98759 (C.D. Cal. Aug. 31, 2011), the court finally approved a class action settlement of consumer claims against Hewlett-

Packard, which agreed to stop selling the defective printer cartridges at issue in that action. The court's finding that the settlement was "fundamentally fair, adequate, and reasonable" was based in part on its observation that class counsel "views this settlement as providing 'virtually all of the injunctive relief sought . . . that directly address[es] the gravamen of the complaints.'" *Id.* at *11.

Similarly, the injunction here accomplishes much of what Plaintiffs sought to achieve with this litigation. As noted above, this consent decree not only mandates that Defendants immediately comply with the law by adequately staffing their Facilities, but also requires them to extensively document their compliance and submit to ongoing review by an independent monitor. The monitoring and oversight compelled by the injunction will provide the residents of the Facilities with a level of care they would not otherwise enjoy. Thamer Decl., ¶ 6. And, should Defendants fail to comply, the Court retains jurisdiction and the ability to order remedial sanctions.

This injunctive relief is conservatively valued at between $8.4 million and $9.75 million, providing a significant benefit to the Class. As detailed in the Healey Declaration, Class Counsel used two separate methods to estimate the monetary value of the injunctive relief. Healey Decl., ¶¶ 11-17. The first method employs a benchmark—the stipulated value of the injunction in *Lavender v. Skilled Healthcare*, a case involving facts and claims similar to those here. Healey Decl., ¶¶ 9, 13-14. The factors underlying the valuation in *Skilled Healthcare* included the costs of paying additional salaries, benefits, and training expenses, and of implementing new staff tracking systems and reporting requirements, to comply with the injunction. Healey Decl., ¶ 13. A mathematical comparison between the number of licensed beds covered by the injunction there, as well as its duration, with the corresponding facts in this case, results in an $8.4 million estimated value for the injunction in this case. Healey Decl., ¶ 14.

Second, Class Counsel provide an alternative valuation pegged to the benefit to the Class (as opposed to the cost of Defendants' compliance). Healey Decl., ¶¶ 15-17. Such an estimate is possible because, under California law, a defendant shown to have violated the rights of a skilled nursing home resident incurs statutory damages of up to $500 per violation. *See* Cal. Health & Safety Code § 1430. Here, Defendants reported 314,300 patient days for all the Facilities covered

by the injunction, and Plaintiffs believe these Facilities failed to satisfy the minimum staffing requirement on approximately 25 percent of the days in question. Healey Decl., ¶ 16. Consequently, there were an estimated 78,575 violations per year. Using a conservative amount of $100 per violation—one-fifth of the $500 maximum potential statutory damages—the potential yearly damages would exceed $7.8 million. Healey Decl., ¶ 16. Over the two-and-one-half year duration of this injunction, the total potential damages for continued non-compliance would exceed $19.5 million. Healey Decl., ¶ 16. However, because the purpose of the statutory remedy is to deter understaffing as well as to compensate residents, the $19.5 million estimate may overstate the actual value conferred upon residents from Defendants' consent to stop violating the law. Healey Decl., ¶ 17. Yet even if only half of the potential $19.5 million benefit were attributed to the injunction, its value would still exceed $9.75 million. Healey Decl., ¶ 17.

Each of these valuation methods is reasonable, and each reveals the Stipulated Injunction to be an outstanding and valuable result for the Class.

b. The Monetary Consideration Provided Under the Settlement Is Reasonable Under the Circumstances.

The absence of monetary recovery to the Class is reasonable given the valuable injunctive relief and Defendants' financial condition. Courts assessing proposed class settlements have recognized that the reasonableness of their monetary consideration must be judged, not in a vacuum, but with a view toward the defendants' actual ability to pay. Indeed, a settling "defendant's overall financial condition and ability to pay" is one of the key factors in the settlement approval analysis. *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975); *see also* 4 *Newberg* § 11:50 (noting that "[c]ollectibility of a judgment . . . bear[s] on the reasonableness of a settlement in relation to the defendants' ability to withstand a greater one."); *Republic Nat'l Life Ins. Co. v. Beasley*, 73 F.R.D. 658, 662, 668 (S.D.N.Y. 1977) (given "the extent of the assets available to be pursued," court rejected objection that the consideration in a "modest" class settlement was too low).

Thus, "[d]ire financial condition weighs heavily in favor of settlement." *Smith v. Dominion Bridge Corp.*, 2007 U.S. Dist. LEXIS 26903, at *19 (E.D. Pa. Apr. 11, 2007). For

instance, in approving the class-wide settlement of ERISA and related claims in *Sheick v. Automotive Component Carrier LLC*, 2010 U.S. Dist. LEXIS 110411 (E.D. Mich. Oct. 18, 2010), the court found: "[A]ll the parties agree that there is a substantial risk that ACC will not be financially capable of continuing to provide benefits were litigation to continue and even if litigation ultimately resulted in a judgment on the merits in favor of the Class Members. Absent settlement, all Class Members would be subject to the uncertainty, risk, hardship and delay attendant to continued litigation, which ultimately might leave them with absolutely nothing." *Id*. at *51. Likewise, in *Wright v. Linkus Enterprises*, 259 F.R.D. 468 (E.D. Cal. 2009), the court granted preliminary approval to a class settlement of claims under the Fair Labor Standards Act, finding that "the financial condition of Defendants creates the possibility that Defendants could not withstand greater liability than the proposed settlement amount."[7] *Id*. at 476.

In another recent decision, *Schwarm v. Craighead*, 814 F. Supp. 2d 1025 (E.D. Cal. 2011), the defendant had gone bankrupt and only approximately $160,000 was available from the estate. Because of the reality that "bankruptcy has made it impossible for each class member to be adequately compensated for the monetary harm they suffered," the court directed that all the money be paid as service awards or attorneys' fees, with nothing to the class. *Id*. at 1031-33. The court explained that "[c]lass members may never benefit financially from class counsel's efforts, but they do benefit from the attorneys' success in stopping defendants' illegal practices and

[7] *See also In re MicroStrategy, Inc. Sec. Litig*., 148 F. Supp. 2d 654, 662 (E.D. Va. 2001) (although the settlement consideration consisted of the corporation's securities rather than cash, the prospects for a cash recovery were slim in light of the corporation's weakened financial condition, and the court granted final approval); *In re Nat'l Student Marketing Litig*., 68 F.R.D. 151, 155-56 (D.D.C. 1974) (uncertain financial condition of the principal corporate defendant justified approval of a partial settlement with it involving no cash recovery—"lines of credit needed to maintain its operations are not easily established or are established on unfavorable terms."); *Seiffer v. Topsy's Int'l, Inc*., 70 F.R.D. 622, 630 (D. Kan. 1976) (evidence supported class counsel's representation that they "seriously doubted" plaintiffs' ability to collect a large judgment); *IUE-CWA v. GMC*, 238 F.R.D. 583, 588-89 (E.D. Mich. 2006) (class counsel hired experts to analyze the settling defendant's precarious financial condition); *In re Corrugated Container Antitrust Litig*., 556 F. Supp. 1117, 1149-51 (S.D. Tex. 1982) (finally approving a class settlement; crediting accountant findings of defendant's "weakened financial condition" and discussing the "important nonmonetary benefits" of the settlement); *In re Chambers Dev. Sec. Litig*., 912 F. Supp. 822, 839 (W.D. Pa. 1995) (stating that the defendant's "precarious financial condition is a major factor favoring approval of the settlement."); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 547 (D. Colo. 1989) ("If the litigation continues, the potential for bankruptcy is real, after which recovery from the corporation is questionable.").

protecting class members . . . . Class counsel achieved some of the benefit the parties sought in bringing suit . . . ." *Id*. at 1029.

The same is true here. The fairness of this Settlement is underscored by the fact that Class members are not releasing any claims; they retain the ability to pursue separate damages claims against Defendants. Agreement, § 9. Moreover, given the Parent Entities' financial condition, continued litigation on a class basis is unlikely to yield a recovery greater than that provided for under the Settlement. Agreement, at 1. The record contains the expert declaration of a forensic accountant, Michael J. Eggers, who scrutinized the Parent Entities' financial documents and concluded they are incapable of paying more than the amount they have agreed to pay. Eggers Decl., ¶¶ 5, 9. This fact was confirmed by the detailed deposition testimony of the CFO of a Parent Entity. Reinholtsen Decl., Exh. A; Eggers Decl., ¶¶ 5-8.

Under these circumstances, the mediator was correct to find that the proposed Settlement embodies "a reasonable and practical resolution of uncertain legal claims and defenses, particularly given Defendants' precarious financial condition . . . . Absent a settlement, both sides would incur substantial expenses from continued litigation, and Defendants could face bankruptcy, resulting in no relief for the class." Yanni Decl., ¶¶ 5, 8; *see also* Cutter Decl., ¶ 4 (settlement resulted from an "assessment of the risks to the class members that Defendants would drain what resources would be available to benefit the class if the case were to continue."). Indeed, by forcing the Defendants into bankruptcy, a significant judgment could harm rather than help the Class members.

c. The Litigation Risks, Including Defendants' Potential Bankruptcy, Support Preliminary Approval.

The potential risks attending further litigation support preliminary approval. The named Defendants, the Evergreen Entities, do not hold substantial assets of their own. This Court, however, dismissed the Parent Entities under Washington law. Order of October 13, 2011 (Dkt. No. 79). Plaintiffs therefore would have to convince the Court to revisit this ruling, and pierce the corporate veil, to have a chance of obtaining a judgment against the Parent Entities—a particularly difficult undertaking under Washington law. *See Minton v. Ralston Purina Co.*, 47

P.3d 556, 562-63 (Wash. 2002). Even assuming Plaintiffs were to surmount the formidable alter-ego hurdle, they would still face the very real possibility of the Parent Entities' declaring bankruptcy.

In addition, both liability and damages are hotly disputed; Plaintiffs would face a host of difficult merits challenges were this case to proceed to trial. Among other arguments, Defendants have claimed that (a) evidence of annualized staffing data does not prove violations of the daily staffing requirements; (b) if permitted to count the hours of all persons who provided nursing care (*e.g.*, including those who are not registered nurses or licensed caregivers), the Facilities were adequately staffed; (c) Health and Safety Code section 1276.5, upon which Plaintiffs rely, does not expressly confer a right upon residents that they may enforce under section 1430(b) or other statutes; (d) given that Plaintiffs have not alleged actual damages resulting from understaffing and have disclaimed recovery for physical injuries, there is a substantial question as to what amount (if any) should be awarded as damages at trial; (e) injunctive relief is precluded on abstention grounds under *Alvarado v. Selma Convalescent Hospital*, 153 Cal. App. 4th 1292, 1298 (2007).

Proceeding to trial could add years to the resolution of this case in view of the legal and factual issues raised and the likelihood of appeals, including with respect to issues already decided by this Court, such as abstention. Considered against the risks of continued litigation and Defendants' potential bankruptcy, the totality of relief under the proposed Settlement is well within the range of reasonableness.

3. The Recommendation of Experienced Counsel and an Experienced Mediator Strongly Favor Approval.

The judgment of competent counsel regarding the proposed Settlement should be given significant weight. *See Linney v. Cellular Alaska Partnership*, 1997 WL 450064, at *5 (N.D. Cal. July 18 1997); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.").

Class Counsel here have extensive experience litigating and settling consumer class

actions and other complex matters.[8] They have intensively investigated the factual and legal issues raised in this action, and that investigation informed the Settlement negotiations. Needham Decl., ¶ 9; Nelson Decl., ¶ 3. The fact that qualified and well-informed counsel endorse the Settlement as being fair, reasonable, and adequate weighs heavily in favor of approval. Nelson Decl., ¶ 9; Thamer Decl., ¶ 6; Healey Decl., ¶ 18; Needham Decl., ¶ 10; Stebner Decl., ¶ 8; Cutter Decl., ¶ 4; Dudensing Decl., ¶ 4.

Furthermore, the key terms of the Settlement were recommended by a capable mediator, Catherine Yanni, who is highly experienced in mediating class actions. Ms. Yanni unreservedly endorses the Settlement, noting "the final settlement terms reflect the litigation risks on both sides, the severe limitations on Defendants' financial resources, and an effort to provide meaningful redress to the Class. The importance of the injunction cannot be overstated, as it will ensure that minimum skilled nursing requirements are met for several years going forwards." Yanni Decl., ¶ 11. The record fully supports her conclusion and the Settlement should be preliminarily approved.

V. PRELIMINARY CERTIFICATION OF AN INJUNCTIVE RELIEF CLASS IS WARRANTED

Provisional certification of a settlement class is a necessary component of preliminary approval. The Court need not consider the manageability of a potential trial because the Settlement, if approved, would obviate the need for a trial. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1021-23 (9th Cir. 1998). A court may certify a class if a plaintiff demonstrates that all of the prerequisites of Federal Rule of Civil Procedure 23(a) have been met, and that at least one of the requirements of Rule 23(b) has been met. *See* Fed. R. Civ. P. 23.

Because this proposed Settlement achieves injunctive relief for the Class, Plaintiffs request certification of a corresponding injunctive relief Class pursuant to Rule 23(b)(2). Class certification is warranted under that subsection if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate

[8] Nelson Decl., ¶¶ 6-8; Thamer Decl., ¶¶ 2-5; Stebner Decl., ¶¶ 2-7; Healey Decl., ¶¶ 4-10; Needham Decl., ¶¶ 2-8; Arns Decl., ¶¶ 2-7; Cutter Decl., ¶¶ 2-3; Dudensing Decl., ¶ 2.

respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Plaintiffs brought this action on behalf of a proposed Class consisting of all persons who resided at one of the Facilities from November 15, 2006 through the date of class certification. Plaintiffs also request certification of Subclasses for each skilled nursing Facility. Each of the requirements of Rule 23(a) and Rule 23(b)(2) is satisfied, making certification appropriate.

First, the members of the Class and the Subclasses are so numerous that joinder of all members is impractical. Plaintiffs are informed and believe that the Class and Subclasses comprise hundreds, if not thousands, of residents at Defendants' Facilities. Further, the Class and Subclasses are composed of easily ascertainable sets of persons who resided at one or more Facility during the Class Period.

Second, this litigation features common class-wide issues that, absent the Settlement, would drive the resolution of the claims. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Several disputed issues are common to Plaintiffs and the Class: whether Defendants violated and continue to violate Section 1430(b) by failing to comply with the 3.2 hour NHPPD requirement of Health and Safety Code section 1276.5; whether Defendants violated and continue to violate Section 1430(b) by failing to provide an adequate number of qualified nursing personnel to carry out all functions at the Facilities, in violation of Health and Safety Code section 1599.1; whether Defendants have violated and continue to violate the CLRA, including, without limitation, Civil Code sections 1770(a)(5) and 1770(a)(7), by failing to disclose, and actively concealing, material facts regarding qualifications and staffing conditions; whether Defendants have violated and continue to violate the UCL in that their conduct is immoral, unscrupulous and contrary to public policy, and the detriment and gravity of that conduct outweighs any benefits attributable to it; and whether Plaintiffs and the Class are entitled to injunctive relief to ensure that Defendants' Facilities satisfy the minimum adequate staffing requirements.

Third, the claims of the representative Plaintiffs are typical of the claims of the Class, and of each Subclass of which a representative Plaintiff is a member. The facts surrounding Defendants' misconduct are common to Plaintiffs and the Class, and represent a common thread

of misconduct that caused similar injuries to all Class members.

Fourth, the named Plaintiffs are adequate Class representatives. Because their claims are typical of those of the Class and Subclasses, Plaintiffs have the same interests in the outcome of this case as the other Class members. The representative Plaintiffs—like all Class members—resided at (or are the successors-in-interest to someone who resided at) one or more of the Facilities during the relevant time period. Class Counsel are likewise adequate based on their prosecution of this case until now and their experience litigating large, complex class actions of this nature, including class actions involving understaffing at skilled nursing homes. Nelson Decl., ¶¶ 3, 6-8; Thamer Decl., ¶¶ 2-6; Stebner Decl., ¶¶ 2-8; Healey Decl., ¶¶ 4-10; Needham Decl., ¶¶ 2-9; Arns Decl., ¶¶ 2-7; Cutter Decl., ¶¶ 2-3; Dudensing Decl., ¶ 2.

Finally, each and every member of the Class is entitled to injunctive relief under Health and Safety Code section 1430(b) as a result of the inadequate levels of qualified nursing staff at Defendants' skilled nursing Facilities. By engaging in pervasive understaffing, Defendants have acted and refused to act on grounds that apply generally to the proposed Settlement Class of residents at those Facilities, such that "final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Therefore, the Class should be preliminarily certified for Settlement purposes. *See, e.g.*, *Jaffe v. Morgan Stanley & Co*., 2008 U.S. Dist. LEXIS 12208 (N.D. Cal. Feb. 8, 2008) ("The parties have agreed upon extensive injunctive relief which reasonable plaintiffs would have brought suit to obtain. Moreover, because Plaintiffs complain primarily of ongoing . . . practices, declaratory and injunctive relief would be necessary and appropriate were Plaintiffs to succeed. Accordingly, the Court hereby CERTIFIES the injunctive-relief class under Rules 23(a) and 23(b)(2).").

VI. THE NOTICE SHOULD BE APPROVED

The proposed form of Notice and the Notice program fully comply with due process and Fed. R. Civ. P. 23. Rule 23(c)(2)(A) authorizes the Court to "direct appropriate notice" to a class certified under Rule 23(b)(2). Every notice of a class action settlement should include a general description of the proposed settlement. *See Churchill Village*, 361 F.3d at 575; *Torrisi v. Tucson*

Elec. Power Co., 8 F.3d 1370, 1375 (9th Cir. 1993).

The proposed Notice here includes all the necessary and appropriate information. *See* Exhibit B hereto. The Notice accurately and succinctly informs the Class members of the salient terms of the Settlement and their right to object to it. The Notice also describes the hearing before this Court on final approval of the Settlement, and the application for awards of attorneys' fees and expenses. The Notice is more than sufficient to apprise the Class of the Settlement terms and their rights.

Notice sent to each class member "who can be identified through reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Accordingly, the settling parties in this case have proposed that the Notice be sent by first class mail to all Class members who can be identified from Defendants' records. Agreement, § 2. The Notice will also be published via a one-time paid advertisement in *USA Today*.

The Court should approve the Notice and the Notice program.

VII. A FINAL FAIRNESS HEARING SHOULD BE SCHEDULED

The last step in the approval process is a Fairness Hearing at which this Court may hear all evidence and argument necessary to determine whether to grant final approval to the Settlement. Plaintiffs respectfully request that the Court set the following schedule for further Settlement-related proceedings:

Deadline for Class Counsel to file their fee application.	30 days after the Court grants preliminary approval.
Deadline for Class members to submit objections to the proposed Settlement and/or to Class Counsel's fee application.	55 days after the Court grants preliminary approval.
Deadline for Class Counsel to submit their final approval motion and responses to any objections.	85 days after the Court grants preliminary approval.
Final Fairness Hearing.	100 days after the Court grants preliminary approval.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order: (1) granting preliminary approval to the Settlement; (2) certifying for settlement purposes the proposed Settlement Class; (3) appointing counsel listed below as Class Counsel; (4) appointing Plaintiffs as Settlement Class Representatives; (5) approving the parties' proposed forms of notice and notice program, and directing that notice be disseminated pursuant to the program; and (6) setting a Fairness Hearing and other dates in connection with the final approval of the Settlement.

Dated: May 16, 2012

Respectfully submitted,

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